

ORIGINAL

RECEIVED

DEC - 7 1992

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
1919 M STREET  
WASHINGTON, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
DEPT. OF THE SECRETARY

IN RE: IMPLEMENTATION OF  
SECTION 10 OF THE CABLE  
CONSUMER PROTECTION AND  
COMPETITION ACT OF 1992

:  
: MM DOCKET NO. 92-258  
:  
:  
:  
:

TO: The Commission

COMMENTS OF  
NUTMEG PUBLIC ACCESS TELEVISION, INC.

Nutmeg Public Access Television, Inc., (Nutmeg TV) is a non-profit public access manager for eight towns that comprise a cable television franchise in central Connecticut. Its public access channels can be seen in over 69,000 subscriber-homes of TCI Cablevision of Central Connecticut - a Telecommunications, Inc. company. On November 10, 1992, the FCC issued a Notice of Proposed Rule Making (NPRM) for the purpose of developing regulations that will permit cable television (CATV) system operators to limit indecent or other objectionable programming on public access channels.

1. The NPRM is in specific response to Section 10 of the 1992 Act. Specifically, Section 10(c) states as follows:

Within 180 days following the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational or governmental access facility for any programming which contains obscene material, sexually

015

explicit conduct, or material soliciting or promoting unlawful conduct.

2. What is of even greater importance is the conforming amendment of the 1992 Act that modifies Section 638 of the Communications Act of 1934, codified at 47 U.S.C. 558. At present, 47 U.S.C. 558 exempts cable operators (and presumably independent access channel managers such as Nutmeg TV) from liability for the content of PEG (public, educational and government) access programming. The conforming amendment removes the exemption from liability for PEG access programming that "involves obscene material." Specifically, it amends Section 638 (47 U.S.C. 558) by striking the period at the end and inserting the following: "unless the program involves obscene material."

#### OBSCENITY

3. Cable operators and independent public access managers face a paradox. The content of most public access programming is determined by the producer or provider, not by the access manager or the cable operator.<sup>1</sup> The conforming amendment, however, appears to impose liability for obscenity without regard to this practice.

4. The Commission should adopt rules that provide for the implementation of this conforming amendment in a way that will

---

<sup>1</sup> Access managers or cable operators produce or provide some programs for the stations they manage. Such programs may include "filler" programs, public service announcements (PSAs) and community event programming. In such instances, access managers would, of course, assume responsibility for program content.

protect access managers from liability, provided they have implemented their own rules and procedures to guard against obscene programming. Otherwise, the Section 10 amendment will require something access managers cable operators fear: The imposition of pre-screening or prior restraint duties. Pre-screening or prior restraint duties would impose administrative costs that most access managers (especially the non-profit, independent access managers) can ill afford. It may also involve them in making prior-restraint decisions that could expose them to liability for wrongly restricting speech.

5. Instead, the FCC should adopt rules that provide for continued protection to access managers from liability for obscene programming, provided the access manager (1) imposes liability for content on the producer or provider of the programming and (2) implements procedures for review and corrective action upon receipt of a complaint of obscene programming.

6. This would formalize what Nutmeg TV already does in practice. Prior to allowing access to the cable channels it manages, Nutmeg TV requires every producer or program provider to sign an agreement whereby the producer or provider acknowledges full liability for programming content. This agreement provides that the programming will not contain obscenity, promote a commercial or business interest, or promote a lottery or game of chance (the latter two restrictions being required by our

Connecticut Department of Public Utility Control).<sup>2</sup>

7. By handling programming content liability in this way, the FCC would avoid prior restraint concerns. Admittedly, this procedure may allow a producer or provider to "get one past" Nutmeg TV's management, since we take our producers and providers at their word and do not pre-screen programming for compliance. However, once Nutmeg TV receives a complaint, its management can investigate whether the program producer or provider breached his or her agreement. It also permits Nutmeg TV to refer the alleged violation of law to the state or local authorities.

8. Nutmeg TV strongly urges the FCC to adopt rules and explanatory language in its Report and Order that continue to provide access managers protection from content liability provided the access manager (1) imposes liability for content on the producer or provider of the programming and (2) implements procedures for review and corrective action upon receipt of a complaint of obscene programming.

**MATERIAL CONTAINING SEXUALLY EXPLICIT CONDUCT  
OR SOLICITING OR PROMOTING UNLAWFUL CONDUCT**

9. The FCC should also adopt rules that encourage cable operators and access managers, if they so desire, to adopt similar procedures as outlined above pertaining to the

---

<sup>2</sup> Nutmet TV likely will amend the agreement it requires from each producer or provider to restrict programming containing "sexually explicit conduct" and "material soliciting or promoting unlawful conduct." Nutmeg TV welcomes guidance from the FCC that would help it define these terms.

prohibition or restriction of programming containing sexually explicit conduct, or material soliciting or promoting unlawful conduct. While the Conforming Amendment that changes Section 638 of the Communications Act appears not to affect access managers' protection against liability for airing programs whose contents fit these two categories, Nutmeg TV prefers not to be embroiled in pre-screening or prior restraint decisions.

#### CONCLUSION

10. We believe that the FCC should adopt rules that impose content liability for obscene material on a PEG access manager only if it does not require a producer or provider to sign a content liability agreement and has taken no steps to take corrective action upon notice of a violation of such an agreement. Further, a PEG access manager should be allowed, using this management method, to require program producers and providers to agree not to provide programming that contains sexually explicit conduct, or material soliciting or promoting unlawful conduct. Under this "duty of reasonable management" the access channels will continue to be open forums for content

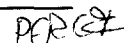
except that it will be clear to program producers and providers that they will be held accountable for their program's contents if they violate the law.

Respectfully submitted

Nutmeg Public Access Television, Inc.  
24 Spring Lane, Farmington, CT 06032

By:

  
\_\_\_\_\_  
Wyland Dale Clift  
Its General Counsel

PER 

December 7, 1992